Filed 4/10/12 P. v. Trindle CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL TRINDLE, Defendant and Appellant.	A131945 (San Mateo County Super. Ct. No. SC54881)

Defendant Michael Trindle appeals after the trial court denied his motion to reduce his conviction of a violation of Vehicle Code[1] section 23153 from a felony to a misdemeanor. We find no abuse of discretion, and affirm.

I. BACKGROUND

In June 2004, defendant pled no contest to a felony charge of driving under the influence of alcohol or drugs and causing injury to another (§ 23153, subd. (a)) (count one, or the DUI conviction) and a felony count of evading a police officer while driving a motor vehicle (§ 2800.2, subd. (a)) (count three). According to the probation report, defendant, a medical doctor, was driving with a companion in the early morning hours of July 24, 2003, after drinking in a bar. His car struck another vehicle from behind, causing it to swerve and flip over. The driver of the other vehicle had lacerations to his hand and wrist, and complained of pain to his head, neck, and wrist. Defendant fled the scene of the accident. California Highway Patrol officers saw defendant driving his car,

[1] All undesignated statutory references are to the Vehicle Code.

which had major collision damage (including a shattered windshield and flat tire), heading toward the Bay Bridge. Defendant did not stop when the officers turned on emergency lights and sirens, instead crossing the bridge and driving as far as Richmond. The wheel with the flat tire was giving off sparks. When his car was stopped, defendant was found to have a blood alcohol level of .19 percent. Defendant's companion said he had told defendant to stop his car. According to the probation report, defendant was a longtime alcoholic, and had been in five programs since 1998. He told the probation officer he had begun drinking again after abusing Vicodin that was prescribed after a surgery.

In October of 2004, the trial court suspended imposition of sentence and put defendant on three years' probation, with a year in county jail.

In March 2006, defendant moved to reduce his felony convictions to misdemeanor convictions. He asserted in his motion that his crimes were the result of his addiction to alcohol and drugs, but that he had been clean and sober for over two years. The trial court denied the motion without prejudice to reviewing it again after one year.

In February 2011, defendant again moved to reduce his convictions to misdemeanors. He argued that relief should be granted because he had no other convictions, he had performed well on probation and had made "great strides toward overcoming his addictions," and his felony convictions hindered him from securing gainful employment as a medical doctor.

In his accompanying declaration, defendant stated that although he had not had a "perfect path," he had been sober for four years. He acknowledged he had had a brief relapse after completing probation, but said he had admitted his relapse to his employer and physician and had returned to his recovery quickly. Since then, he had received regular treatment for depression, attended regular 12-step meetings, and attended outpatient meetings of a drug and alcohol treatment program on an " 'as needed' " basis. He had surrendered his medical license in 2006, but hoped to reinstate his license and train as a psychiatrist.

The trial court granted the motion as to the conviction for evading an officer, and denied it as to the DUI conviction.

II. DISCUSSION

A. Individual Consideration of Facts of Case

Defendant contends the trial court failed to take into consideration the individual facts of his case in denying his request to reduce count one to a misdemeanor. A review of the statutory background is required to understand this issue. A first violation of section 23152, which governs driving while under the influence of alcohol or drugs, is a misdemeanor. (§ 23536; Pen. Code, § 17, subd. (a).) A first violation of section 23153, which governs driving while under the influence of alcohol or drugs and causing injury to another, is a wobbler, that is, an offense that can be treated as either a felony or a misdemeanor. (§ 23554.) As relevant here, under section 23550.5, subdivision (a)(2), a violation of either section 23152 or 23153 that occurs within ten years of "[a] prior violation of Section 23153 that was punished as a felony" is also a wobbler. Thus, within that ten-year period, a violation of section 23152—even if it would otherwise be a misdemeanor—may be treated as a felony.

In opposing defendant's request to reduce the section 23153 conviction to a misdemeanor, the District Attorney argued that, although defendant had made strides in his recovery, he should continue to face the enhanced penalties provided by section 23550.5 for the full ten-year washout period in the event he relapsed and reoffended. The prosecutor made the same argument at the hearing on the motion, arguing that "priorability is important. One reason why the [L]egislature picked ten years is a recognition that people who have an alcohol problem can maintain sobriety for a while and sometimes relapse. I'm not saying that Dr. Trindle will do that." The court replied, "*He has done that*. It's evidenced in his own declaration." (Italics added.) The court then disagreed with defense counsel's argument that there was no legitimate reason to deny the motion, and said that "[a]t ten years and one day," it would be willing to reduce the offense to a misdemeanor. In making its ruling, the court said, "I think there is a very legitimate reason as articulated by [the prosecutor] and in the People's response in

maintaining a felony conviction for driving under the influence of alcohol, particularly when there was an injury, and I recognize the injuries here were not serious, at least from my review of his file. It was still a felony DUI conviction. [¶] The law provides that any subsequent DUI conviction within a ten-year period following his matter that has been sentenced as a felony and maintained as a felony can also be charged as a felony. So there is a legitimate reason for maintaining the status quo in this case as opposed to granting the extraordinary relief that your client is seeking, and it's well within the court's discretion to grant or deny the relief."

Defendant moved to reduce his convictions to misdemeanors under Penal Code section 17, subdivision (b)(3), which provides that a crime is a misdemeanor for all purposes "[w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." The decision whether to grant such a request is within the trial court's sound discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*). In *Alvarez*, our Supreme Court explained that "since all discretionary sentencing authority is contextual, those factors that direct similar sentencing decisions are relevant, including 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.] When appropriate, judges should also consider the general objectives of sentencing . . . . The corollary is that even under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.' [Citation.]" (*Id*. at p. 978, fn. omitted.)

Defendant contends the trial court failed to undertake such an individualized consideration. According to defendant, the trial court looked solely to the reasons the Legislature established the ten-year period of section 23550.5, without considering whether in his individual case, it should exercise its discretion to reduce his conviction of section 23153 to a misdemeanor. The record shows otherwise. After the prosecutor

argued that people may be sober for a period of time and then relapse, the court noted that defendant had done exactly that, as shown by his own declaration. Defendant's declaration, executed in January, 2011, stated he had been sober for four years, presumably placing the beginning of his current period of sobriety at the beginning of 2007—*after* his first motion to reduce his convictions from felonies to misdemeanors, in which he argued he had been clean and sober for two years.[2] The court also noted that the victim had been injured. Thus, it appears the trial court considered not only the goals of the statutory scheme, but also defendant's individual circumstances. We see no abuse of discretion in its ruling.

B. Was Defendant's Offense Punished as a Felony?

Defendant also challenges the trial court's ruling on the ground that the court based its decision on an error of law—that is, the erroneous belief that his DUI conviction fell within the ten-year washout period of section 23550.5, subdivision (a)(2), because it was "punished as a felony." Defendant argues that although he was *convicted* of a felony violation of section 23153, his grant of probation was not *punishment* for the felony, and accordingly any further offenses would not be subject to the enhanced consequences of section 23550.5.

As defendant points out, our Supreme Court stated in *People v. Howard* (1997) 16 Cal.4th 1081, 1092 (*Howard*), "[g]rant of probation is, of course, qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither 'punishment' [citation] nor a criminal 'judgment' [citation]. Instead, courts deem probation an act of clemency in lieu of punishment [citation], and its primary purpose is

[2] Defendant avers in his reply brief that his actual period of sobriety at the time of his January, 2011, declaration was three years and four months. As we have noted, defendant admitted he was a longtime alcoholic, and his offenses appear to have occurred after he had participated in multiple programs.

rehabilitative in nature [citation]." (See also *People v. Mancebo* (2002) 27 Cal.4th 735, 754.)[3]

In the particular context of the statutes controlling the issue before us, however, it appears the Legislature intended the term "punished" to encompass cases where the defendant receives probation after a conviction rather than a prison or jail term. As we have explained, section 23554 provides that if a defendant is "convicted of a first violation of Section 23153, that person shall be punished" by a prison term or a jail term, and by a fine. Section 23556, subdivision (a)(1) provides: "If the court grants probation to any person *punished* under section 23554," the court shall impose certain conditions of probation, including jail time, a fine, and suspension of driving privileges. (Italics added; see also § 23556, subd. (a)(2).) Similarly, section 23536 provides for jail time and a fine for persons convicted of a first violation of section 23152 (driving under the influence of alcohol or drugs), and section 23538 requires certain probation conditions "[i]f the court grants probation to person *punished* under Section 23536." (Italics added; see also §§ 23540, 23542, 23546, 23548, 23560, 23562, 23566, 23568.) Thus, for purposes of the statutory scheme at issue here, the Legislature seems to have included a grant of probation within the meaning of the term "punished."

This conclusion is buttressed by *People v. Camarillo* (2000) 84 Cal.App.4th 1386 (*Camarillo*). The question before the court there was whether a conviction for driving under the influence of alcohol could be pled as a prior felony conviction where the court had acted under Penal Code section 17 to reduce the conviction from a felony to a misdemeanor. (*Camarillo*, *supra*, 84 Cal.App.4th at p. 1388.) In answering that question in the negative, the court made clear that an admission to felony probation for such an offense constituted punishment as a felony for purposes of former section 23175.5 (now section 23550.5). According to the court, "the language and legislative history of former

[3] The question before the court in *Howard* was whether a trial court has the power to reduce a defendant's sentence when the court imposes sentence but suspends its execution, and the defendant begins a period of probation without appealing; the court concluded it does not. (*Howard*, *supra*, 16 Cal.4th at pp. 1084, 1095.)

section 23175.5 provide no support for [the Attorney General's] suggestion that the statutory phrase 'prior violation . . . that was punished as a felony' specifies anything other than a felony conviction." (*Camarillo, supra*, 84 Cal.App.4th at p. 1390.) Moreover, the court said it did not quarrel with the position that the defendant's conviction "was *originally* 'punished as a felony' under former section 23175.5. Clearly, appellant was initially admitted to felony probation." (*Ibid*.) The court examined the legislative history of the " 'punished as a felony' " provision—an earlier proposed version of which had referred to violations " 'punished or punishable as felonies' "—and concluded the Legislature intended "to narrow application of the statute, to differentiate between felony convictions and misdemeanor convictions, and to preclude the use of wobbler offenses that did not also result in felony convictions." (*Id*. at pp. 1392-1393.)

Bearing in mind both the language of the DUI statutes and the analysis of *Camarillo*, we conclude that a defendant who was convicted of a felony violation of section 23153 and was given probation suffered a violation that was "punished as a felony" for purposes of section 23550.5, subdivision (a)(2). The trial court did not misinterpret the statutory language, and there is no basis to reverse its ruling.

III. DISPOSITION

The judgment is affirmed.

_____
RIVERA, J.

We concur:

_____
RUVOLO, P. J.

_____
SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.